Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–10 OF 2006(W)
AHMAD FAIRUZ CHIEF JUSTICE, NIK HASHIM AND AUGUSTINE PAUL FCJJ
12 OCTOBER 2006

Criminal Procedure — Habeas corpus — Release of detainee — Appeal — Fresh detention order issued — Whether appeal had become academic — Whether of public interest that appeal be heard

Preventive Detention — Detention order — Application for habeas corpus — Detention made under Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Whether judge erred in his interpretation of section 3(3)(a) and (b) of the 1969 Ordinance — Extent of ratio decidendi in Mohd Faizal bin Haris case

Preventive Detention — Detention order — Application for habeas corpus — Whether there is a need for affidavits to be filed in respect of the prior arrest

The respondent was arrested on 8 September 2004 under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the 1969 Ordinance'). On 5 November 2004, a detention order was made against him under s 4(1) of the 1969 Ordinance for a period of two years with effect from 6 November 2004. On 24 October 2005, he filed a motion for the issue of a writ of habeas corpus. On 12 January 2006, the High Court made an order for the issue of the writ. In making the order the learned judge of the high court took the view that there was non-compliance by the police with the requirements of s 3(3)(a) and (b) of the 1969 Ordinance thereby vitiating the order made by the Minister. Even though the defect, if any, occurred prior to the making of the detention order by the Minister the learned judge argued that he was not bound by the judgment of this court in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Os* [2006] 1 MLJ 309 ('*Mohd Faizal bin Haris*') where it was held that a writ of habeas corpus must be directed against the current detention order when it has been made subsequent to a prior arrest and detention. The reason why the learned judge did not feel bound by the case of *Mohd Faizal bin Haris* is that the detention order in that case was not made under the 1969 Ordinance but under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the 1985 Act'). Subsequent to the issue of the writ of habeas corpus by the high court a fresh detention order was made against the respondent for a period of two years where he is currently under detention. When the appeal came up for hearing learned counsel raised a preliminary objection to the effect that the appeal must be dismissed as it had become academic following the making of the

second detention order against the respondent. This appeal raises for consideration the proper interpretation to be accorded to s 3(3)(a) and (b) of the 1969 Ordinance and the extent of the ratio decidendi of the recent judgment of this court in *Mohd Faizal bin Haris*.

Held, allowing the appeal:

(1) The resultant matter for consideration is whether the appeal must still be heard in the public interest. The matter before us is not one concerning private law rights. It involves a public authority and the issues submitted on relate to questions of public law. The proper interpretation to be accorded to s 3(3)(a) and (b) of the 1969 Ordinance is of tremendous significance and it will not involve a consideration of the facts of the case. The question of the applicability of the *ratio decidendi* of *Mohd Faizal bin Haris* to the 1969 Ordinance is of greater importance. These are issues that will affect existing cases and will arise in the future if they are not resolved as soon as possible. They must therefore be settled. Public interest requires this appeal to be heard (see paras 6–7).

(2) It is the so-called 'microscopic analysis' of s 3(3)(a) and (b) and s 3(5) of the 1969 Ordinance by the learned judge which led him to magnify the tiny and insignificant word 'in' in the provisions as a gigantic and dominant part controlling their meaning. This in turn made him to misinterpret s 3(3)(a) and (b) of the 1969 Ordinance which only require the authority of a police officer to detain a person. There is nothing in their language to require the police officer authorising the detention of a person to select a particular place where the person is to be detained and to direct the officer in charge of that place to receive and detain the person. Section 3(5) of the 1969 Ordinance which caused the learned judge to view s 3(3)(a) and (b) in a completely different light than that portrayed. The subsection is clear and unambiguous. It is in two parts. The first part is a deeming provision stating that any person detained under the powers conferred by the section shall be deemed to be in lawful custody. The second part prescribes the places where such a person may be detained. Section 3(5) of the 1969 Ordinance does not have any bearing in any way on the meaning to be accorded to s 3(3)(a) and (b). The learned judge has therefore erred in his interpretation of s 3(3)(a) and (b) of the 1969 Ordinance (see paras 12–13).

(3) The material facts in the present case are identical to that of *Mohd Faizal bin Haris*. There was also a prior arrest followed by a detention order. The learned judge had found a defect in the prior arrest. Instead of applying the ratio decidendi of *Mohd Faizal bin Haris*, the learned judge undertook the unnecessary task of analysing the differences between the 1969 Ordinance and the 1985 Act and had thereby misdirected himself. The conclusion of the learned judge cannot be sustained. He is bound by the judgment of this court in *Mohd Faizal bin Harris* and ought to have exercised more caution and restraint in distinguishing it (see para 17).

(4) Learned counsel also contended that *Mohd Faizal bin Haris* does not say that it is not necessary for affidavits to be filed in respect of the prior arrest. He said that what this means is that affidavits must in fact be filed and the defects,

A if any, must then be overlooked. Such an exercise will not serve any purpose. If nothing that has happened prior to the making of the current detention order is relevant it follows that there is no necessity to explain the sequence of events that transpired at that time. It follows that there is no necessity for affidavits to be filed in relation to the prior arrest (see para 18).

B **[Bahasa Malaysia summary**

Responden ditangkap pada 8 September 2004 di bawah Ordinan Darurat (Ketenteraman Awam dan Pembanterasan Jenayah) 1969 ('Ordinan 1969 itu'). Pada 5 November 2004 satu perintah penahanan dibuat terhadapnya di bawah C seksyen 4(1) Ordinan 1969 itu untuk jangka masa dua tahun berkuatkuasa dari 6 November 2004. Pada 24 Oktober 2005 responden memfailkan satu usul pengeluaran suatu writ habeas corpus. Pada 12 Januari 2006 mahkamah tinggi memberikan perintah untuk mengeluarkan writ tersebut. Dalam memberikan perintah tersebut, hakim mahkamah tinggi yang bijaksana mengambil pandangan D bahawa ketidakpatuhan oleh polis akan keperluan-keperluan seksyen 3(3)(a) dan (b) Ordinan 1969 itu menyebabkan perintah yang dikeluarkan oleh Menteri tersebut cacat. Walaupun kecacatan tersebut, sekiranya ada, berlaku sebelum membuat perintah penahanan oleh Menteri tersebut, hakim yang bijaksana menyatakan bahawa beliau tidak terikat dengan penghakiman mahkamah ini dalam kes *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ E 309 ('Mohd Faizal bin Haris') di mana ia diputuskan bahawa sesuatu writ habeas corpus mesti diarahkan terhadap perintah penahanan semasa walaupun ia dibuat selepas satu penangkapan dan penahanan. Alasan kenapa hakim yang bijaksana berasa tidak terikat dengan kes *Mohd Faizal bin Haris* adalah disebabkan perintah penahanan dalam kes tersebut tidak dibuat di bawah Ordinan 1969 itu tetapi F di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta tersebut'). Setelah pengeluaran writ habeas corpus oleh mahkamah tinggi satu perintah penahanan baru dibuat terhadap responden untuk jangka masa dua tahun dan sekarang berada di dalam tahanan. Apabila rayuan ini didengarkan, peguamcara bijaksana membangkitkan bantahan awal bahawa rayuan ini harus ditolak oleh G kerana perkara ini telah menjadi akademik apabila satu perintah penahanan yang kedua dibuat terhadap responden. Rayuan ini membangkitkan untuk pertimbangan tafsiran yang betul terhadap seksyen 3(3)(a) dan (b) Ordinan 1969 itu dan setakat mana ratio decidendi penghakiman yang terbaru mahkamah ini di dalam kes *Mohd Faizal bin Haris*.

H

Diputuskan, membenarkan rayuan tersebut:

(1) Perkara untuk dipertimbangkan di sini ialah sama ada rayuan itu mesti didengar atas kepentingan awam. Perkara sebelum kami bukannya berhubungan dengan undang-undang hak persendirian. Ia melibatkan pihak I berkuasa awam dan isu-isu yang dibentangkan berhubung dengan soal undang-undang awam. Tafsiran yang betul yang diberikan kepada seksyen 3(3)(a) dan (b) Ordinan 1969 itu adalah amat penting dan ia tidak melibatkan pertimbangan fakta-fakta kes. Soal pemakaian ratio decidendi *Mohd Faizal bin Haris* kepada Ordinan 1969 itu adalah sangat penting. Ini adalah isu-isu yang

menjejaskan kes-kes masa kini dan yang akan dibangkitkan di masa depan sekiranya ia tidak diselesaikan secepat mungkin. Dengan itu mereka harus diselesaikan. Kepentingan awam memerlukan rayuan ini didengar (lihat perenggan 6–7).

(2) Ia merupakan satu 'microscopic analysis' seksyen 3(3)(a) dan (b) dan seksyen 3(5) Ordinan 1969 itu oleh hakim yang bijaksana yang menyebabkannya membesarkan perkataan 'in' yang tidak penting itu di dalam peruntukan sebagai satu bahagian yang besar dan berpengaruh yang mengawal maksudnya. Ini membuatkan beliau salah tafsir seksyen 3(3)(a) dan (b) Ordinan 1969 itu yang hanya memerlukan kuasa seorang pegawai polis untuk menahan seseorang. Tiada apa juga pun yang memerlukan pegawai polis yang menguatkuasakan penahanan seseorang untuk memilih sesuatu tempat di mana orang itu akan ditahan dan mengarahkan pegawai yang bertugas di tempat tersebut untuk menerima dan menahan seseorang. Seksyen 3(5) Ordinan 1969 itu yang menyebabkan hakim yang bijaksana memandangkan seksyen 3(3)(a) dan (b) dalam keadaan yang berbeza daripada apa yang sebenarnya. Subseksyen adalah jelas dan tidak taksa. Ia mengandungi dua bahagian. Bahagian pertama adalah peruntukan andaian yang menyatakan bahawa sesiapa yang ditahan di bawah kuasa yang diberikan oleh seksyen tersebut akan dianggap berada dalam jagaan yang sah. Bahagian kedua menetapkan tempat-tempat di mana seseorang boleh ditahan. Seksyen 3(5) Ordinan 1969 itu tidak mempunyai sebarang kaitan dalam apa juga cara terhadap maksud yang diberikan kepada s 3(3)(a) dan (b). Hakim yang bijaksana dengan ini telah salah dalam interpretasinya terhadap seksyen 3(3)(a) dan (b) Ordinan 1969 itu (lihat perenggan 12–13).

(3) Fakta-fakta yang material dalam kes sekarang adalah serupa dengan kes *Mohd Faizal bin Haris*. Terdapat penangkapan terdahulu diikuti dengan perintah penahanan. Hakim yang bijaksana telah menjumpai kecacatan dalam penangkapannya yang terdahulu. Daripada menerimapakai ratio decidendi *Mohd Faizal bin Haris* hakim yang bijaksana menjalankan tugas yang tidak diperlukan dalam menganalisakan perbezaan di antara Ordinan 1969 itu dan Akta 1985 dan dengan itu salah arahkan dirinya sendiri. Kesimpulan yang dicapai hakim yang bijaksana itu tidak dapat diterima. Beliau diikat dengan penghakiman mahkamah ini dalam kes *Mohd Faizal bin Haris* dan harus lebih berhati-hati dan berjaga dalam membezakannya (lihat perenggan 17).

(4) Peguam yang bijaksana juga menyatakan bahawa *Mohd Faizal bin Haris* tidak menyatakan bahawa ia tidak perlu untuk afidavit-afidavit difailkan berhubungan dengan penangkapan yang terdahulu. Beliau menyatakan apa yang dimaksudkan di sini ialah bahawa afidavit-afidavit seharusnya mesti difailkan dan kecacatan, sekiranya ada, seharusnya tidak diendahkan. Latihan sebegini tidak ada gunanya. Sekiranya tiada apa yang berlaku sebelum pembuatan perintah penahanan terkini adalah relevan dengan ini tiada keperluan untuk menjelaskan urutan kejadian yang berlaku pada masa tersebut. Dengan ini, tiada keperluan untuk afidavit-afidavit difailkan berhubungan dengan penangkapan yang terdahulu (lihat perenggan 18).]

Notes

For a case on release of detainee, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2009.

For cases on application for habeas corpus, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1258–1273.

Cases referred to

Ainsbury v Millington [1987] 1 All ER 929 (refd)

Cardinal v Director of Kent Institution [1985] 2 SCR 643 (refd)

Karpal Singh v Inspector General of Police & Ors [1989] 1 MLJ 184 (refd)

Kumaran Suppiah v Dato' Noh bin Haji Omar & Ors [2006] 6 MLJ 393 (refd)

Marshall and the Queen, Re (1984) 13 CCC (3d) 73 (Ont HC) (refd)

Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113 (refd)

Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2006] 1 MLJ 309 (folld)

Morin v National Special Handling Unit Review Committee [1985] 2 SCR 62 (refd)

PP v Karpal Singh Ram Singh and another case [1988] 1 CLJ (Rep) 249 (refd)

R v Secretary of State for the Home Department; ex parte Salem [1999] 2 All ER 42 (refd)

R v Secretary of State for the Home Dept; ex parte Salem [1999] 2 All ER 42 (refd)

Rajoo s/o Ramasamy v Inspector General of Police & Ors [1990] 1 MLJ 430 (refd)

Rasid bin Kulop Mohamad v Timbalan Menteri Dalam Negeri & Ors [2005] 2 MLJ 535 (refd)

Sun Life Assurance Co of Canada v Jervis [1944] 1 All ER 469 (refd)]

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985

Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(3)(a), (b), (5), 4(1)

Appeal from: Criminal Application No 44–89 of 2005 (High Court, Kuala Lumpur)

Abd Wahab bin Mohamed (Najib bin Zakaria with him) (Deputy Public Prosecutors, Attorney General's Chambers) for the appellants.

N Sivananthan (Abd Shukor Ahmad and Baljit Singh Sidhu with him) for the respondent.

Augustine Paul FCJ (delivering judgment of the court):

[1] This appeal was heard together with Federal Court Criminal Appeal No 05–12 of 2006(W). It raises for consideration the proper interpretation to be accorded to s 3(3)(a) and (b) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the 1969 Ordinance') and the extent of the ratio decidendi of the recent judgment of this court in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309 ('*Mohd Faizal bin Haris*').

[2] On 8 September 2004, the respondent was arrested under the 1969 Ordinance. On 5 November 2004, a detention order was made against him under section 4(1) of the 1969 Ordinance for a period of two years with effect from 6 November 2004. On 24 October 2005, he filed a motion for the issue of a writ of habeas corpus. On 12 January 2006, the High Court made an order for the issue of the writ. In making the order the learned judge of the High Court took the view that there was non-compliance by the police with the requirements of s 3(3)(a) and (b) of the 1969 Ordinance thereby vitiating the order made by the Minister. Even though the defect, if any, occurred prior to the making of the detention order by the Minister the learned judge argued that he was not bound by the judgment of this court in *Mohd Faizal bin Haris* where it was held that a writ of habeas corpus must be directed against the current detention order when it has been made subsequent to a prior arrest and detention. The reason why the learned judge did not feel bound by the case of *Mohd Faizal bin Haris* is that the detention order in that case was not made under the 1969 Ordinance but under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the 1985 Act'). Subsequent to the issue of the writ of habeas corpus by the High Court a fresh detention order was made against the respondent for a period of two years and he is currently under detention.

[3] When the appeal came up for hearing before us learned counsel raised a preliminary objection to the effect that the appeal must be dismissed as it had become academic following the making of the second detention order against the respondent. In support, he referred to cases such as *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 and *Ainsbury v Millington* [1987] 1 All ER 929. In his reply, the learned Deputy Public Prosecutor referred to *Karpal Singh v Inspector General of Police & Ors* [1989] 1 MLJ 184,*Public Prosecutor v Karpal Singh Ram Singh and another case* [1988] 1 CLJ (Rep) 249 and Rajoo Ramasamy v Inspector General of Police & Ors (1990) 1 CLJ (Rep) 256 and said that the appeal had not been rendered academic. He then referred to*R v Secretary of State for the Home Department; ex parte Salem* [1999] 2 All ER 42 and contended that even if the appeal had become academic it must still be heard in the public interest as the interpretation given to s 3(3)(a) and (b) of the 1969 Ordinance and the manner in which *Mohd Faizal bin Haris* was applied by the learned judge will seriously affect other cases which are pending.

[4] In the recent judgment of this court in *Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113, this court dealt with the circumstances in which a pending matter may be rendered academic at pp 120–121 in the following terms:

> In dealing with the circumstances in which an appeal will be rendered academic and thereby not appealable, Viscount Simon LC said in *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 at pp 470–471:
>
> > I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.

> … … … I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.
>
> The test, therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative the appeal cannot be said to have become academic. This test has found favour with a plethora of local cases such as *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147; *Datuk Syed Kechik bin Syed Mohamed & Anor v Board of Trustees of the Sabah Foundation & Ors* [1997] 1 MLJ 257 and *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513.

Mohd Faizal bin Haris has made it clear that habeas corpus only calls for justification of the detention at the point of time when the court considers the case. Any prior illegality will be irrelevant. As the respondent is now being detained under the second detention order, the first one, the subject matter of this appeal, will therefore be not relevant. This is so as the outcome of the appeal in this case will not affect either party in any way in view of the existence of the second detention order. The appeal is therefore academic. The cases relied on by the learned Deputy Public Prosecutor to argue that the appeal had not become academic do not support his stand as the question of the appeal on the first detention orders having become academic was not raised nor addressed in those cases.

[5] The resultant matter for consideration is whether the appeal must still be heard in the public interest. In considering the circumstances in which a pending matter which has since become academic may still be heard Lord Slynn of Hadley said in *R v Secretary of State for the Home Dept; ex parte Salem* [1999] 2 All ER 42 at p 47:

> My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the Sun Life case and Ainsbury v Millington (and the reference to the latter in r 42 of the Practice Directions Applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.
>
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.

[6] The matter before us is not one concerning private law rights. It involves a public authority and the issues submitted on relate to questions of public law. The proper interpretation to be accorded to s 3(3)(a) and (b) of the 1969 Ordinance is of tremendous significance and it will not involve a consideration of the facts of the case. The question of the applicability of the ratio decidendi of *Mohd Faizal bin Haris* to the 1969 Ordinance is of greater importance. These are issues that will affect existing cases and will arise in the future if they are not resolved as soon as possible. They must therefore be settled. The Canadian Courts have heard appeals after the

release of detainees in order to settle important points of law (see *Re Marshall and the Queen* (1984) 13 CCC (3d) 73 (Ont HC); *Cardinal v Director of Kent Institution* (1985) 2 SCR 643; *Morin v National Special Handling Unit Review Committee* (1985) 2 SCR 62). We were therefore of the view that public interest requires this appeal to be heard.

[7] We shall now address both the issues.

(a) Section 3(3)(a) and (b) of the 1969 Ordinance

[8] Section 3(3)(a) and (b) of the 1969 Ordinance read as follows:

> (3) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under section 4(1): Provided that —
>
> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent;

[9] The learned judge, in interpreting s 3(3)(a) and (b) of the 1969 Ordinance said in his grounds of judgment:

> In the aforesaid *Rasid Kulop*'s case, I have analytically decided that, the 'police officers' in exercising their powers under s 3(3)(a) or (b) of the Ord which is also similarly applicable to s 3(2)(a) or (b) of the 1985 Act are substantially required to address the relevant documents to the proper and appropriate 'other police officer(s)' (for example, the one(s) referred to under s 3(1), (2) and (4) of the Ord or s 3(1) of the 1985 Act) to detain the A & D person failed to comply with one of the 'procedural substantive requirements' as reflected in the relevant documents exhibited in all the three applications before me. Such non-compliance had the effect of vitiating the legality of the proper exercise of power by the Minister.
>
> I also note that, despite the aforesaid Rasid Kulop's case being decided on 17 September 2004, to date the forms used by the 'police officers' under s 3(3)(a) or (b) of the 1969 Ord and s 3(2)(a) or (b) of the 1985 Act, which were amongst the main thrust of my decision in the aforesaid *Rasid Kulop*'s case, have yet to be accordingly rectified in order to be in consonant with one of the legislative, 'substantive procedural requirements'. Consequential to such 'substantive' non-compliance and on the premises of the above, I therefore allowed all the applications and ordered that writ of habeas corpus to be issued accordingly.

[10] It is perhaps necessary to peruse *Rasid bin Kulop*'s case in order to have a proper appreciation of the learned judge's argument. The case is reported as *Rasid bin Kulop Mohamad v Timbalan Menteri Dalam Negeri & Ors* [2005] 2 MLJ 535 where the learned judge said at pp 538–539:

> Microscopic analysis of both the aforesaid sub-sections of s 3 of the Act dictates me to search the legal significance of the word 'in' in both ss 3(3) and 3(5) of the Act. In s 3(3), it speaks of ' … detained in police custody … ', whilst in s 3(5) it clearly states as ' … deemed to be in lawful custody, … ' which can be done so ' … in any prison, or in any police station,

A or in any other similar place authorised … by the Minister.' Thus the use of the word 'in' suggests, without doubt, that, the 'detained person' must be detained in any of the places specified by s 3(5) of the Act. Such custody, by virtue of s 3(3), is 'in police custody', which s 3(5) deems it ' … to be in lawful custody … '. Nowhere in both ss 3(3) and 3(5) speak of being 'in' the 'lawful custody' of any of the 'police officers' referred to in s 3(3)(a)–(c) of the Act. The said s 3(3)(a)–(c) identifies 'which' of the police officers 'can do what' in order to make the arrest and detention lawful.

'Can do what', in my opinion, will certainly fall within the intention of 'Procedurally substantive' matter(s) referred to me earlier. In the context of my above analysis, in order to satisfy the word 'in' found in s 3(5) discussed above it follows that, any of the officers exercising his power under s 3(3)(a) or (b) of the Act must direct appropriate prison officer(s) or police officer(s) of any police station or officer(s) of other similar places authorised by the Minister 'to receive and detain' the detained person 'in any prison' or 'in any police station' or 'in any other similar place … ' but certainly not to himself. To comply with the above requirements, there must be conclusive evident (sic) that the officers exercising their powers under s 3(3)(a) and (b) aforesaid communicate to any officers of 'any prison' or 'any police station' or 'any other similar place (of lawful detention)' which can be extracted from all the relevant facts of the application. Unfortunately I could not find any.'

[11] It is the so-called 'microscopic analysis' of s 3(3)(a) and (b) and s 3(5) of the 1969 Ordinance by the learned judge which led him to magnify the tiny and insignificant word 'in' in the provisions as a gigantic and dominant part controlling their meaning. This in turn made him to misinterpret s 3(3)(a) and (b) of the 1969 Ordinance which only require the authority of a police officer to detain a person. There is nothing in their language to require the police officer authorising the detention of a person to select a particular place where the person is to be detained and to direct the officer in charge of that place to receive and detain the person. Section 3(5) of the 1969 Ordinance which caused the learned judge to view s 3(3)(a) and (b) in a completely different light than that portrayed reads as follows:

Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorised generally or specially by the Minister.

[12] The subsection is clear and unambiguous. It is in two parts. The first part is a deeming provision stating that any person detained under the powers conferred by the section shall be deemed to be in lawful custody. The second part prescribes the places where such a person may be detained. Section 3(5) of the 1969 Ordinance does not have any bearing in any way on the meaning to be accorded to s 3(3)(a) and (b). The learned judge has therefore erred in his interpretation of s 3(3)(a) and (b) of the 1969 Ordinance.

(b) The ratio decidendi of Mohd Faizal bin Haris

[13] In submitting on the relevancy of the defect in the arrest of the respondent prior to the making of the detention order against him, the learned Deputy Pubic

Prosecutor drew the attention of the learned judge to *Mohd Faizal bin Haris*. In commenting on the extent of the case, the learned judge said in his grounds of judgment:

> Be that as it may, Encik Azari however brought to my attention the case of Mohd Faizal Haris v Tim Me*Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309. Relying on the said case, he contended any defect at the detention level under section 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985 'the 1985 Act') would not make the relevant subsequent 'Detention Order' ('D/O') under section 6 of the 1985 by the Minister unlawful. In all probabilities I would have agreed with him if the aforesaid 3 Applications before me were made under the 1985 Act on the principle of stare decisis, but they were not so. They were made under Emergency (Public Order and Prevention of Crime) Ordinance, 1969 ('the 1969 Ord'). That being so, and with the greatest of respect, my humble analysis of the relevant sections of both the 1985 Act and the 1969 Ord led me to conclude that, the aforesaid Mohd Faizal's case cannot be blanketly applied to all Applications under the 1969 Ord. My such considered conclusion based on the said analysis demonstrates a clear obvious wisdom of the Legislator to have different 'procedural considerations', both 'substantively procedural' as well as 'procedurally procedural', for Applications made under each of those two aforesaid legislations. The reasons being, inter alia, as explained below.

[14] Thus the learned judge was of the view that since the motion before him was under the 1969 Ordinance the case of *Mohd Faizal bin Haris*, being a case that dealt with the 1985 Act, was inapplicable. In arriving at his conclusion the learned judge only dealt with the differences between both the laws. He did not find it necessary to advert to the ratio decidendi of *Mohd Faizal bin Haris*. As *Precedent in English Law* (4th Ed) by Cross and Harris says at p 63:

> According to Dr Goodhart the ratio decidendi of a case is determined by ascertaining the facts treated as material by the judge. It is the principle to be derived from the judge's decision on the basis of those facts. Any court bound by the case must come to a similar conclusion unless there is a further fact in the case before it which it is prepared to treat as material, or unless some fact treated as material in the previous case is absent.

[15] The material facts in *Mohd Faizal bin Haris* were that the making of the detention order against the detanu was preceded by his arrest which had some defects. The question that arose for determination was whether the defects in the arrest of the detanu vitiated the subsequent detention order made against him. It was held that a writ of habeas corpus must be directed against the current detention order when it has been made subsequent to a prior arrest and detention. Thus any illegality in the prior arrest and detention cannot be the subject matter of inquiry. As this court said in that case at pp 318–319:

> Thus any irregularity in a detention order made under s 3(2) when it has been superseded by one under s 6(1) is not a relevant matter for consideration. In this regard T*he Law of Habeas Corpus* (2nd Ed) by RJ Sharpe says at p 179:
>
> > It has been held consistently that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ. This rule means that nothing which has happened before the present cause of detention took effect will be relevant to the issue before the court, unless by reason of some special consideration arising from the particular proceedings.

A And at p 186:

> On the present state of the law, in almost every instance, the relevant time at which the detention is to be justified is the time at which the court considers the case. Prior illegality will not be relevant unless by reason of some special rule derived from the particular nature of the proceedings involved.

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> Therefore a prior illegality which has ceased cannot be the subject matter of inquiry. That would also be the conclusion in the case of a detention order made under s 8(1) of the Internal Security Act 1960 and s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 subsequent to an arrest and detention made under both the statutes.

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[16] The material facts in the present case are identical to that of *Mohd Faizal bin Haris*. There was also a prior arrest followed by a detention order. The learned judge had found a defect in the prior arrest. Instead of applying the ratio decidendi of *Mohd Faizal bin Haris*, the learned judge undertook the unnecessary task of analysing the D differences between the 1969 Ordinance and the 1985 Act and had thereby misdirected himself. As a matter of fact, the applicability of the ratio decidendi in question to a detention order made under the 1969 Ordinance has been explicitly stated in the passage reproduced above. Accordingly, the conclusion of the learned judge cannot be sustained. He is bound by the judgment of this court in *Mohd Faizal* E *bin Haris* and ought to have exercised more caution and restraint in distinguishing it.

[17] Learned counsel also contended that *Mohd Faizal bin Haris* does not say that it is not necessary for affidavits to be filed in respect of the prior arrest. He said that what this means is that affidavits must in fact be filed and the defects, if any, must F then be overlooked. Such an exercise will not serve any purpose. If nothing that has happened prior to the making of the current detention order is relevant, it follows that there is no necessity to explain the sequence of events that transpired at that time. It follows that there is no necessity for affidavits to be filed in relation to the prior arrest.

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[18] There is one other matter that requires to be addressed. While this case was awaiting judgment by us learned counsel drew our attention to the recent judgment of this court in *Kumaran Suppiah v Dato' Noh bin Haji Omar & Ors* [2006] 6 MLJ 393 (Federal Court Criminal Appeal No 05-38-2006 (J)) where it was held that H when a detention order is made to take effect subsequent to the date on which it was made the delay must be explained. He said that as there was a delay in the date of commencement of the detention order in this case the delay must be explained. As that was not done the appeal must be dismissed. However when we sat to hear the argument on this issue, learned counsel withdrew the objection. It must be observed that when the detention order was made in this case there was no legal obligation on I the appellants to explain the delay in the effective date of the detention order.

Accordingly, it is our view that learned counsel took the correct stand in withdrawing the objection.

[19] In the upshot, we allow the appeal.

Appeal allowed.

Reported by Sally Kee